LEONG WAN YIN & ANOR.

v.

NESTRA PLANTATIONS SDN. BHD.

HIGH COURT MALAYA, SEREMBAN
WONG KIM FATT JC
[CIVIL SUIT NO. 250 OF 1981]
28 JANUARY 1982

CIVIL PROCEDURE: *Interim injunction - Discharged on application to set aside - Certificate - Lack of legal or equitable interest of plaintiff in property concerned - Future state and conditions of property pending final disposal - Rules of the High Court 1980, O. 29, O. 56 r 2(2).*

The plaintiffs filed their appeal to the Federal Court on 19 January 1982 against the decision of the learned Judicial Commissioner in chambers made on 29 December 1981 discharging the interim injunction granted by him on 11 December 1981. The learned Judicial Commissioner gave his certificate under O. 56 r. 2(2), of the Rules of the High Court 1980, on 6 January 1982 that he required no further argument. The events leading to the appeal were as follows.

By an agreement in writing dated 8 April 1981, the plaintiffs and one Mohammad Abu Bakar contracted to sell 97% of their shares in a Malaysian private limited company by the name of Lemo Sdn. Bhd. ("Lemo"), the principal asset of which comprised 1,000 acres of oil palm estate in Trengganu. Founding their action on the above agreement, the plaintiffs sued the defendants for numerous orders as follows:

(a) A declaration that the agreement dated the 8 April 1981 became impossible of performance on the failure to obtain the approval from the Foreign Investment Committee within the stipulated time - by 8 October 1981.

(b) A declaration that all acts done including the appointment of the nominee directors Muhammad b. Awang and Rosdy b. Abdul Rahman and the company secretary Norma Mohd. Sani in anticipation of the completion of the agreement created to have any further effect on 8 October 1981 on the failure to obtain the approval.

(c) A declaration that the first plaintiff Leong Wan Yin alias Leong Mun Ying and Mohd. Abu bakar are the directors of Lemo with effect from the 8 October 1981 and are entitled to carry out all the acts and functions assigned to them by the Articles of Association.

(d) An injunction restraining Muhammad bin Awang, Rosdy bin Abdul Rahman and Norma Mohd. Sani to act as directors, company secretary and/or officers of Lemo forthwith.

(e) That the stakeholders and/or the defendants return all the share certificates and the blank transfer forms to the plaintiffs and/or Mohd. Abu Bakar.

(f) That the defendants retransfer all the shares registered into their names within 7 days of the service of the order and on their failure to do so, the Senior Assistant Registrar may effect such transfers or assurances to effect the ownership or alternatively that the Senior Assistant Registrar do direct the rectification of Lemo's register to effect this order.

(g) An account of all receipts and expenses of Lemo.

(h) Return of all books of accounts, vouchers, books, all documents and register of shareholders belonging to Lemo.

(i) Damages if any after taking of account for any waste and other acts.

(j) Costs and interests.

Soon after filing the writ and statement of claim, the plaintiffs made an *ex-parte* application by summons-in-chambers dated 10 December 1981 for the following order:

1. The defendants and their nominee Directors namely Muhammad bin Awang and Rosdy bin Abdul Rahman and the company secretary Norma Mohd. Sani be restrained from doing whether by themselves or by their servants or agents or any of them or otherwise howsoever the following acts or any of them until further order that is to say:

(a) To act as Directors and/or officers of the Company Lemo Sdn. Bhd.

(b) To manage the affairs of the Company;

(c) To carry out the extraordinary General Meeting of Lemo Sdn. Bhd. called by them for the 15 December 1981, or at all;

2. The defendants and their nominee Directors namely Muhammad bin Awang and Rosdy bin Abdul Rahman and the company secretary Norma Mohd. Sani by themselves or by their servants or agents or any of them do hand over all cheque books, books of accounts, company seal, vouchers, books, documents and register of shareholders belonging to the company to Leong wan Yin @ Leong Mun Ying the first plaintiff/Applicant within 10 days of the service of this order.

The plaintiffs having made representations to the Court that the matter was of great urgency the application was heard on 11 December 1981. The plaintiffs referred to the Sale/Purchase agreement dated 8 April 1981 relating to the Sale of 97% Shares in Lemo which they exhibited in their joint affidavit affirmed on 10 December 1981 and filed herein. Counsel for the plaintiffs submitted that the sale was subject to the approval of the Foreign Investment Committee to be obtained within 180 days or to mutual extension in writing and that the period had expired and no extension had been granted by the plaintiffs. The first plaintiff and another Director had resigned pursuant to the terms of the agreement and the defendants had appointed their nominees to replace them and they had also appointed a company secretary. The plaintiffs informed the Court that they had received only RM281,300 out of the total consideration of RM2,813,000. Relying on the submissions of counsel and the face value of the joint affidavit, particularly with reference to overwhelming 97% shares as stake and on personal undertakings by counsel to abide by the order of Court as to damages and costs that the defendants might sustain by reason of the order the learned J.C. granted the order for injunction as prayed, with liberty to the defendants to apply to set it aside within 3 weeks from the date of service of the order.

The defendants promptly applied by summons-in-chambers for an order to set aside the order of injunction dated 11 December 1981. Affidavits were filed on behalf of the defendants by their director and an Advocate & Solicitor which revealed that:

(a) The plaintiffs had not disclosed the fact that the defendants were at the time of the hearing of the *ex-parte* application for injunction, the registered owners of 51% of the shares in issue acquired when the sale agreement was varied and all the other shareholders, other than the 1st plaintiff, had transferred their shares to the defendants.

(b) The 2nd plaintiff was one of those who had transferred his share to the defendants.

(c) The delay in obtaining the approval of the Foreign Investment Committee was due to the statutory accounts of Lemo not being prepared by the plaintiffs.

(d) The 2nd plaintiff had waived the requirement of Foreign Investment Committee approval.

The plaintiffs, on their part, submitted that:

1. They had no knowledge of the fact that the defendants were the registered owners of 51% shares in Lemo.

2. Pursuant to the agreement between the parties, the 1st plaintiff had resigned his directorship in Lemo and the shares transferred by both the plaintiffs were handed to a firm of solicitors as stakeholders pending payment of the balance of the purchase price and since the defendants had moved in to manage the oil palm estate, the principal asset of Lemo, the plaintiffs were without any protection.

3. Lemo would suffer irreparable loss if the injunction was discharged. KPM Khidmat Sdn. Bhd. should be appointed as managing agents for the estate.

Held:

[1] The plaintiffs had not disclosed several material facts. Even assuming that the plaintiffs had no knowledge, as submitted by them, that the defendants were the registered owners of 51% shares in Lemo, ignorance or lack of knowledge cannot constitute a valid ground for the injunction to continue to remain in force. Some of the material facts were certainly in the knowledge of the 2nd plaintiff as he had executed the agreement transferring shares to the defendants.

[2] Since the application for an interim injunction under O. 29 of the Rules of the High Court is made *ex-parte*, the plaintiff must disclose fully and frankly all facts material for consideration by the Judge. Equally, it is the duty of counsel as officer of the Court, and in the interest of justice to disclose to the Judge all material facts or relevant legislation or judicial decisions coming to his personal knowledge at the hearing of the application although these may be adverse to his client's application. In the present application it was shown that the plaintiffs themselves had not disclosed several material facts. On this ground of non-disclosure alone, the injunction should be discharged.

[3] The *status quo* was best preserved by reverting the parties to their respective positions immediately before granting of the interim injunction. Although the plaintiffs alleged that Lemo would suffer irreparable harm if the injunction was discharged, they had not filed any report from any visiting agent for the Court's consideration. On the other hand, the two reports of the visiting agent of the defendants showed that the conditions of the estate had not deteriorated, although the progress achieved had not been fast enough. The future state and conditions of the estate pending the final settlement being considered, it was more beneficial, or if expressed negatively, less harmful to the estate for the defendants to retain possession and management of the estate until disposal of the suit or further order of the Court.

[4] Order made for injunction to be set aside, the question of damages and costs to be reserved for the trial.

[Injunction set aside. Question of damages and costs reserved for the trial.]

Cases referred to:

Sari Artists Film Productions Sdn. Bhd. v. Malaysia Film Industries Sdn. Bhd. [1974] 1 MLJ 123
Negocios Del Mar SA v. Doric Shipping Corporation SA ("The Assios") [1979] 1 Lloyd's Rep. 331
Third Chandris Shipping Corporation v. Unimarine SA [1979] 2 All ER 972
Macaura v. Northern Assurance Co. Ltd. [1925] All ER 51

Legislation referred to:
Companies Act 1965, s. 181
Rules of the High Court 1980, O. 29, O. 56 r. 2(2)

For the defendants/applicants - R.R. Sethu (Ng Yoke Mui with him)
For the plaintiffs/respondents - Ting Poi Tek (Chin Choon Fan with him); M/s. Nik Saghir, Dr. Yaacob & Ismail, Chin & Co.

JUDGMENT

Wong Kim Fatt JC:

The plaintiffs filed their appeal to the Federal Court on 19 January 1982 against my decision in chambers made on 29 December 1981 discharging the interim injunction granted by me on 11 December 1981. I gave my certificate under O. 56 r. 2(2), of the Rules of the High Court 1980, on 6 January 1982 that I required no further argument. The events leading to this appeal may be described as follows. By an agreement in writing dated 8 April 1981, the plaintiffs and one Mohammad Abu Bakar contracted to sell 97% of their shares in a Malaysian private limited company by the name of Lemo Sdn. Bhd. ("Lemo"). The principal asset of Lemo comprised some 1,000 acres of oil palm estate in Trengganu. Founding their action on the above agreement, the plaintiffs sued the defendants for numerous orders as follows:

(a) A declaration that the agreement dated 8 April 1981 became impossible of performance on the failure to obtain the approval from the Foreign Investment Committee within the stipulated time - by 8 October 1981.

(b) A declaration that all acts done including the appointment of the nominee directors Muhammad bin Awang and Rosdy bin Abdul Rahman and the company secretary Norma Mohd. Sani in anticipation of the completion of the agreement ceased to have any further effect on 8 October 1981 on the failure to obtain the approval.

(c) A declaration that the first plaintiff Leong Wan Yin alias Leong Mun Ying and Mohd. Abu Bakar are the directors of Lemo with effect from 8 October 1981 and are entitled to carry out all the acts and functions assigned to them by the articles of association.

(d) An injunction restraining Muhammad bin Awang, Rosdy bin Abdul Rahman and Norma Mohd. Sani to act as directors, company secretary and/or officers of Lemo forthwith.

(e) That the stakeholders and/or the defendants return all the share certificates and the blank transfer forms to the plaintiffs and/or Mohd. Abu Bakar.

(f) That the defendants retransfer all the shares registered into their names within 7 days of the service of the order and on their failure to do so, the Senior Assistant Registrar may effect such transfers or assurances to affect the ownership or alternatively that the Senior Assistant Registrar do direct the rectification of Lemo's register to effect this order.

(g) An account of all receipts and expenses of Lemo.

(h) Return of all books of accounts, vouchers, books, all documents and register of shareholders belonging to Lemo.

(i) Damages if any after taking of accounts for any waste and other acts.

(j) Costs and interests

Soon after filing the writ and statement of claim, the plaintiffs made *ex parte* application by summons-in-chambers dated 10 December 1981 for the following order:

(1) The defendants and their nominee directors namely Muhammad bin Awang and Rosdy bin Abdul Rahman and the company secretary Norma Mohd. Sani be restrained from doing whether by themselves or by their servants or agents or any of them or otherwise howsoever the following acts or any of them until further order that is to say:

(a) To act as directors and or officers of the company Lemo Sdn. Bhd.;

(b) To manage the affairs of the company;

(c) To carry out the extraordinary general meeting of Lemo Sdn. Bhd. called by them for 15 December 1981 or at all;

(2) The defendants and their nominee directors namely Muhammad bin Awang and Rosdy bin Abdul Rahman and the company secretary Norma Mohd. Sani by themselves or by their servants or agents or any of them do hand over all cheque books, books of accounts, company seal, vouchers, books, documents and register of shareholders belonging to the company to Leong Wan Yin @ Leong Mun Ying the first plaintiff/applicant - within 10 days of the service of this order.

Learned Counsel for the plaintiffs made representations to me that the application was of great urgency. I therefore decided to hear it early on 11 December 1981. In support of the application the plaintiffs filed a joint affidavit affirmed on 10 December 1981, exhibiting the sale and purchase agreement dated 8 April 1981, relating to the sale of the 97% shares in Lemo. Mr. Ting Poi Tek and Mr. Chin Choon Fan, Counsel for the plaintiffs, appeared before me in chambers and referred to the agreement of sale, which Counsel submitted was subject to the approval of the foreign investment committee to be obtained in 180 days, or to mutual extension in writing. The period had expired and no extension had been granted by the plaintiffs. The first plaintiff and another director had resigned their office pursuant to the terms (Clause 6.3) of the sale agreement, and the defendants had appointed their nominees Muhammad bin Awang and Rosdy bin Abdul Rahman to be directors (Clause 6.2) and Norma Mohd. Sani to be company secretary. I was urged by Counsel that by granting the injunction the *status quo* would be maintained and that acts detrimental to Lemo would be prevented. The plaintiffs, I was told, had received only RM281,300 out of the total consideration of RM2,813,000. The additional consideration of RM1,000,000 had also not been paid. Relying on submissions of Counsel and the face value of the joint affidavit, particularly with reference to the overwhelming 97% shares at stake, and accepting the personal undertaking of learned Counsel Mr. Ting and Mr. Chin to abide by the order of Court as to damages and costs that the defendants might sustain by reason of my order, I granted the order for injunction as prayed, with liberty to the defendants to apply to set it aside within three weeks from the date of service of the order.

The defendants promptly applied by summons-in-chambers entered No. 204 of 1981, which is the subject matter of this appeal, for an order to set aside the order of injunction dated 11 December 1981, As the matter was urgent, I agreed to hear the application during Court vacation on 17 December 1981. In support of their application, the defendants filed an affidavit affirmed on 14 December 1981 by Muhammad bin Awang, a director of the defendant company, and a further affidavit affirmed on 15 December 1981 by Ismail bin Ibrahim, an advocate and solicitor. After hearing argument by learned Counsel on both sides, I adjourned the application to 29 December 1981 for continued hearing, with liberty to the parties to file further affidavits. The defendants filed a supplementary affidavit affirmed by Muhammad bin Awang on 28 December 1981 and the plaintiffs a further joint affidavit affirmed on 29 December 1981. From the supplementary affidavit of Mohammad bin Awang, it was clear that the plaintiffs did not disclose that the defendants were at the time of the hearing of the *ex parte* application for injunction, the registered owners of 51% of shares in Lemo.

Sometime before the execution of the agreement on 8 April 1981, the shares in Lemo were owned by the following persons in the following proportions:

Leong Wan Yin @ Leong Mun Ying (1st plaintiff)	49%
Hashim bin Ismail (2nd plaintiff)	18%
Mohammad bin Abu Bakar	30%
Dato' Haji Wan Hassan bin Abdul Halim	3%
	100%

But the second plaintiff had by an agreement dated 16 November 1981, before he and the first plaintiff applied for the injunction in December 1981, permitted (for consideration) registration of his 18% shares in Lemo in favour of the defendants. The non-disclosure of this material fact by the plaintiffs (or at least the 2nd plaintiff) could not be said to be due to oversight or inadvertence. By an agreement dated 14 November 1981, Mohammad bin Abu Bakar, who is not a party to these proceedings, had varied the said agreement of 8 April 1981 in respect of the sale of his 30% shares in Lemo. Except the first plaintiff who held 49% of the shares in Lemo, all the other shareholders had transferred their respective shares to the defendants, thereby giving the defendants 51% of the shares in Lemo. The defendants thus acquired a controlling interest in Lemo at all material times.

As regards the allegation that foreign investment committee approval had not been obtained in time, it appeared from the affidavits filed on behalf of the defendants that the delay was due to the statutory accounts of Lemo not being prepared by the plaintiffs. However, by the said agreement of 16 November 1981 (Clause 2) the second plaintiff had waived the requirement of foreign investment committee approval, a waiver again not disclosed by the plaintiffs. As to whether the failure to obtain the approval of the foreign investment committee within 180 days rendered the contract invalid, I am of the view that this is a matter for consideration at the trial of the suit.

The principles and authorities on the granting of an *ex parte* order for injunction are clear. Since the application for an interim injunction under O. 29 of the Rules of the High Court is made *ex parte*, the plaintiff must disclose fully and frankly all facts material for consideration by the Judge. In other words, no material facts should be withheld or suppressed by the plaintiff in his affidavit and/or other affidavits filed on his behalf in support of his application. Equally, it is the duty of Counsel, as officer of the Court, and in the interest of justice, to disclose to the Judge all material facts or relevant legislation or judicial decisions coming to his personal knowledge at the hearing of the application, although these may be adverse to his client's application.

In the present application, it was shown that the plaintiffs themselves had not disclosed several material facts: (1) the defendants owned 51% of the shares in Lemo, (2) the second plaintiff had by agreement of 16 November 1981 varied the agreement of 8 April 1981 concerning his entire 18% equity in Lemo, and (3) the second plaintiff had waived the requirement of foreign investment committee approval. On material fact no. 1, learned Counsel for the plaintiff explained that the plaintiffs were not aware that the defendants were the registered owners of 51% shares in Lemo. Assuming that the plaintiffs had no knowledge of that fact, I do not think ignorance or lack of knowledge constituted a valid ground for the injunction to continue to remain in force. As to material facts Nos. 2 and 3, they were certainly in the knowledge of the second plaintiff since he himself executed the said agreement of 16 November 1981. On this ground of non-disclosure alone, the injunction should be discharged.

As to the authorities, I need only refer to *Sari Artists Film Productions Sdn. Bhd. v. Malaysia Film Industries Sdn. Bhd.* [1974] 1 MLJ 123, *Negocios Del Mar SA v. Doric Shipping Corporation SA ("The Assios")* [1979] 1 Lloyd's Rep. 331 and *Third Chandris Shipping Corporation v. Unimarine SA* [1979] 2 All ER 972 at 984 The common vein that runs through all these cases is that the plaintiff should make full and frank disclosure of all facts which are material for the Judge to know. If no proper disclosures are made, the injunction must be discharged.

There were also other grounds why the injunction should be discharged.

Since the defendants had acquired the controlling interest in Lemo, I do not consider it proper for the Court by the process of injunction to restrain the defendants, their directors, servants or agents from the management of the affairs of Lemo. It would not be proper in the circumstances to order the defendants to hand over all cheque books, books of accounts, company seal, vouchers, books, documents and the register of shareholders belonging to Lemo to the first plaintiff, who, as a shareholder and vendor, had no property, legal or equitable, in the property of Lemo (see *Macaura v. Northern Assurance Co. Ltd.* [1925] All ER 51, 54). If the plaintiffs were alleging mismanagement of Lemo, their legal remedy in appropriate cases of oppression came under s. 181 of the Companies Act 1965.

The plaintiffs maintained that their action was based on contract. Pursuant to the terms of the agreement dated 8 April 1981, which was prepared and attested by an advocate and solicitor, the first plaintiff had resigned his directorship in Lemo. Counsel for the plaintiffs submitted that the share transfers by both plaintiffs were handed to a firm of solicitors as stakeholders pending payment of the balance of the purchase price. The plaintiffs were thus not given any protection because the defendants had moved into manage the oil palm estate, the principal asset of Lemo.

The plaintiffs seemed to have glossed over the fact that the express provisions for the firm of solicitors to act as stakeholders were intended to safeguard the legitimate interest of the parties to the contract. It is not relevant for the Court to speculate whether the stakeholders would act, or had acted contrary to their duties as stakeholders, or if the plaintiffs would suffer as a result, or what right of action they had for damages against the stakeholders, who are not parties to these proceedings.

In deciding whether to hand over possession and management of the oil palm estate to the plaintiffs, I was most concerned about its future state and conditions pending the final disposal of the suit or further order of the Court. There were two conflicting alternatives open to the Court: (1) To allow the defendants to continue the possession and management of the estate, and (2) To hand over possession and management of the estate to the plaintiffs. In deciding which alternative to adopt, the Court should adopt the one which was more beneficial, or which caused less harm to the estate. A possible third alternative for the appointment of an independent professional manager for the estate needed consideration only if the first two alternatives were totally impracticable.

The plaintiffs alleged in their joint affidavit of 29 December 1981 that Lemo would suffer irreparable loss if the injunction was discharged. They suggested the appointment of KPM Khidmat Sdn. Bhd. as managing agents for the estate but no report from any consultant or visiting agent was filed for my consideration.

On the other hand, the two reports of the visiting agent of the defendants showed that the conditions of the estate had not deteriorated, although the progress achieved had not been fast enough. Since 1 June 1981, the defendants had been managing the estate till the interim injunction was granted and served on them.

Considering all the above circumstances and on a balance of convenience, the *status quo* was best preserved by reverting the parties to their respective positions immediately before the granting of the interim injunction. Of the two alternatives, I consider it more beneficial, or, in negative expressions, less harmful to Lemo for the defendants to retain possession and management of the estate until final disposal of the suit or further order of the Court.

I therefore made an order for the order for injunction granted on 11 December 1981 to be set aside, reserving the question of damages and costs for the trial. I also indicated verbally to Counsel that I would be prepared to consider giving an early trial of the suit should Counsel be so minded to apply.

Also found at [1982] CLJ 251